5

Office-Supreme Court, U. S.
FILED
SEP 22 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 347

EARL T. ELLIS, RECEIVER OF THE QUANTICO COMPANY, INCORPORATED,

Petitioner,

vs.

CLIFTON B. CATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CHARLES WILLIAM FREEMAN,
Counsel for Petitioner.

1832-16th Street, N. W.,
Washington, D. C.

INDEX

Subject Index

	Page
Petition	1
Caption	1
Jurisdiction	2
Summary Statement of the Matter Involved	2
Federal Rules Involved	4
Federal Statute Involved	4
Questions Presented	4
Reasons Relied on for allowance of the Writ	5
Conclusion	9
Brief	11
No Opinion by either Court below	11
Jurisdiction	11
The Facts	11
Specification of Errors	12
Preliminary Statement	12
Argument	13
Point 1. The Court of Appeals erred in its order of April 13, 1951, granting the motion of respondent to dismiss the appeal and dismissing it	13
Point 2. The Court of Appeals erred in its order of June 25, 1951, denying petitioner's motion to vacate its order dismissing the appeal	15
Point 3. The Court of Appeals erred in failing to review and pass upon the questions and points of law presented by the record from the trial Court	17
Point 4. The Court of Appeals erred in failing to consider and pass upon the purported judgment of July 20, 1949	18
Point 5. The Court of Appeals erred in failing, to consider and pass upon the purported order of January 24, 1951, from which an appeal was taken	21
Point 6. The Court of Appeals erred in failing to construe the provisions of Rule 77 (b), first sentence, of the Federal Rules of Civil Procedure	24
Conclusion	24

Cases Cited

	Page
Brown v. *Fletcher*, 237 U. S. 583, 586-588	18
Chicot County v. *Sherwood*, 148 U. S. 529, 534	17
In re Ex parte Morgan, 114 U. S. 174	20
In re Weber, 4 N. Dak. 119, 59 N. W. 523	8
Kelly v. *United States*, 2 cir., 89 F. 2d 866, 869	20
Klapprott v. *United States*, 335 U. S. 601	14, 22
Liberty Oil Co. v. *Condon Bank*, 260 U. S. 233, 245	7, 18
Lutcher & Moore Lumber Co. v. *Knight*, 217 U. S. 257	6, 17
Maryland Casualty Co. v. *Jones*, 279 U. S. 792, 796	7, 18
Mutual Life Insur. Co. v. *Phinney*, 178 U. S. 327	17
Palmer v. *Texas*, 212 U. S. 481	8
Rehfeld v. *Baltimore, etc.*, 187 Fed. 810	23
State v. *Hall*, 142 N. Car. 710	21
State v. *Nathan*, 49 S. Car. 199, 222	21
State ex rel. v. *Muench*, 217 Mo. 124, 117 S. W. 25	8
Sublett v. *Gardner*, 144 Ky. 190, 137 S. W. 864	21
Twist v. *Prairie Oil Co.*, 274 U. S. 684, 692	7
U. S. v. *Essex Automobile*, 276 Fed. 28	23
United States v. *Ginsberg*, 243 U. S. 475	20
United States v. *Stoller*, 180 Fed. 910, 913	21
United States v. *Turner*, 8 cir., 47 F. 2d 86	8, 14, 23
Wm. Cramp Sons v. *Curtiss Turbine Co.*, 228 U. S. 645	18

Text Books

Freeman on Judgments (5th Ed.), section 17	7
Freeman on Judgments (5th Ed.), section 19	8
Freeman on Judgments (5th Ed.), section 51 and 322	20
Freeman on Judgments (5th Ed.), section 326	20
64 C. J. section 3, p. 34	19

Federal Rules Involved

Rule 77 (b), first sentence of the Federal Rules of Civil Procedure	4, 12

Federal Statute Involved

Title 28 U. S. C., section 296, third paragraph	4, 5, 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No.

EARL T. ELLIS, RECEIVER OF THE QUANTICO COMPANY, INCORPORATED,

Petitioner,

vs.

CLIFTON B. CATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Earl T. Ellis, Receiver of The Quantico Company, Incorporated, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on April 13, 1951, dismissing petitioner's appeal from a final order of January 24, 1951, entered by the Clerk of the United States District Court for the Eastern District of Virginia, at Alexandria, denying the petitioner's

motion to vacate its purported judgment entered by the Clerk of said Court on July 20, 1949.

Jurisdiction

The decision of the Court of Appeals below was entered on April 13, 1951 (R. 31), and its order denying petitioner's motion to vacate said order was entered June 25, 1951 (R. 36). This petition was filed in this Court on September 22, 1951.

Jurisdiction of this Court to review that decision of the Court of Appeals is invoked under Title 28 United States Code, section 1254 (1), and section 2101 (c).

Summary Statement of the Matter Involved

Petitioner, Earl T. Ellis, Receiver of The Quantico Company, Incorporated, as plaintiff brought this action against Clifton B. Cates (respondent here) as defendant in the United States District Court for the Eastern District of Virginia, at Alexandria, to recover possession of a certain 1900-acre tract of land situated within the United States Marine Corps post at Quantico, Virginia (R. 1-6). On June 6, 1949, the Hon. Don Gilliam, United States District Judge for the Eastern District of North Carolina, appeared in the District Court below, by special assignment, and conducted a hearing on the plaintiff's motion for summary judgment in his favor, together with his motion to strike the motion of the defendant for summary judgment, reserved decision thereon (R. 8-10) and (R. 28) adjourned the Court, and returned to his own district at Tarboro, North Carolina. On July 20, 1949, Judge Gilliam, while at Tarboro, signed a paper in the form of a final judgment, supplied him by Government attorneys for the defendant, without knowledge of plaintiff's counsel, declaring that the plaintiff was not entitled to recover possession

of the lands described in the complaint; that the action be dismissed; and that plaintiff's motion for summary judgment be denied (R. 20-21), and then transmitted it by letter (R. 18) to the Clerk of the District Court at Alexandria, Virginia, who entered the same upon his records as of July 20, 1949, as a final judgment against the plaintiff and in favor of the defendant in the case. This unauthorized proceeding of Judge Gilliam was not discovered by petitioner's counsel until the month of September, 1950, while the whole record was pending in this Court as No. 739, October Term, 1949, where a report of it was made to this Court by his amendment to his petition for rehearing.

On December 27, 1950, petitioner filed a motion in the action in the District Court below to vacate such purported judgment of July 20, 1949, on the ground of being void because not rendered in open court, as required by Rule 77 (b), first sentence, of the Federal Rules of Civil Procedure, and 12 other grounds (R. 21). The motion was filed pursuant to Rule 60 (b) (4) and (6) of the Federal Rules of Civil Procedure. Appended to the motion was a notice served upon counsel for the defendant advising him that the motion would be presented to the Court, with Judge Gilliam sitting, at Alexandria, Virginia, on January 30, 1951, for argument and submission. On the preceding January 24, 1951, Judge Gilliam at Tarboro, North Carolina, wishing to avoid argument of counsel on paragraph 11 of said motion, drafted and signed a paper, in the form of a court order, and transmitted it by letter to the Clerk of the Court at Alexandria, Virginia, who entered the same upon his records as of January 24, 1951, as an order denying the plaintiff's motion to vacate (R. 24-25). This order sought to change the Court's docket entries made by the Clerk on June 6, 1949 into an event which never occurred (R. 24); and it ignores Judge Gilliam's own signature on the purported judgment of July 20, 1949. (This fabrication

is detailed in the brief under Point 5.) From this order an appeal was taken on February 20, 1951, to the Court of Appeals below where it was docketed on March 30, 1951. On April 13, 1951, that Court passed an order granting respondent's motion to dismiss said appeal, and dismissed it (R. 31). On April 27, 1951, petitioner filed a motion to vacate said order of dismissal, and to reinstate said appeal on the docket, as being void on its face. This motion was denied by that Court by its order of June 25, 1951 (R. 36). Proper orders staying the mandate have been entered. This petition for writ of certiorari was filed on September 22, 1951.

Federal Rules Involved

Rule 77 (b), first sentence, of the Federal Rules of Civil Procedure provides: "*Trials* and *Hearings*. All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room."

Federal Statute Involved

Title 28 U.S.C., section 296, third paragraph, provides:

> "A judge or justice who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters."

Questions Presented

1. Whether a district judge of the United States, who appears in a case in a District Court in a district other than his own, by special assignment, and conducts a hearing on the plaintiff's motion for summary judgment, and his mo-

tion to strike the motion of the defendant for summary judgment, reserves his decision thereon, adjourns the Court, and returns to his own district, may there lawfully sign a paper, in the form of a final judgment, supplied him by Government attorneys, declaring that the plaintiff is not entitled to recover possession of the lands described in the complaint; that the action be dismissed; and that the plaintiff's motion for summary judgment be denied; and then transmit it by letter to the Clerk of the District Court for entry upon his records as a final judgment against the plaintiff in the case, within the meaning of Rule 77 (b), first sentence, of the Federal Rules of Civil Procedure, and Title 28 U. S. C., section 296, third paragraph.

2. Whether the purported judgment entered by the Clerk of the District Court below on his records on July 20, 1949, after its receipt by letter from Judge Don Gilliam at Tarboro, North Carolina, is void because not rendered by the Judge in open court, according to the usual course of judicial proceedings, and within the meaning of Rule 77 (b), first sentence, of the Federal Rules.

3. Whether the purported order entered by the Clerk of the District Court below on his records on January 24, 1951, after its receipt by letter from Judge Don Gilliam at Tarboro, North Carolina, is void because not rendered in open court and not authorized by Title 28, U. S. C., section 296, third paragraph.

4. Whether the Court of Appeals and the District Court below, and their officers, have deprived petitioner of his property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Reasons Relied On for Allowance of the Writ

(a) The questions presented by this petition are of great public importance in the administration of justice in the

district courts of the United States. The question of whether a United States District Judge, like Judge Don Gilliam in this case, who has been assigned by a Senior Circuit Judge to sit in a case in a district court in a district other than his own, appears therein and conducts a hearing on the plaintiff's motion for summary judgment, together with his motion to strike the motion of the defendant for summary judgment, reserves his decision thereon, adjourns the Court, and returns to his own district, may there lawfully sign a paper, in the form of a final judgment, supplied him by Government attorneys, declaring that the plaintiff is not entitled to recover possession of the lands described in the complaint; that the action be dismissed; *and that the plaintiff's motion for summary judgment be denied,* without reference to plaintiff's other motion to strike (R.), and then transmit it by letter (R. 13) to the Clerk of the District Court for entry on his records as a final judgment against the plaintiff in the case, within the meaning of Rule 77 (b), first sentence, of the Federal Rules of Civil Procedure, and Title 28 United States Code, section 296, third paragraph, is an important question of federal law which has not been passed upon, but should be settled by this Court. Judgments of judges, by proxy, are not authorized by any law of Congress, or rule of Court. Such a practice is prevalent among federal judges in Virginia and other parts of the United States, and, unless terminated by this Court, will destroy the federal judiciary.

(b) The Court of Appeals below, by its order dismissing the appeal on motion of the respondent, and its order refusing to vacate that order and reinstate the appeal on motion of the petitioner, denied to petitioner his day in court; in other words, was equivalent to condemning him without affording him an opportunity to be heard. *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, 267-268. That Court

refused to look at the original record, then before it from the District Court below, and pass upon the questions there presented for decision. Petitioner relied on these questions and determination thereof, as his only hope of reversing the case and preserving his property. That Court, by its action, denied petitioner an opportunity to appear by counsel and argue his motion to vacate the void judgment of July 20, 1949, or be heard on the merits of the order appealed from, namely, the order entered by the Clerk of the District Court below on January 24, 1951, after its receipt by letter from Judge Don Gilliam then in North Carolina. The fact that the Senior Circuit Judge (John J. Parker) designated Judge Gilliam to sit in the case in Virginia, or that the Court of Appeals once affirmed such *void* judgment, ought not relieve that Court from looking into the record and seeing what the subject-matter is, and then reverse or affirm the order appealed from, as the law requires, Title 28 U. S. C. section 2106.

Maryland Casualty Co. v. *Jones,* 279 U. S. 792, 796, involved the question of whether the Court of Appeals for the Ninth Circuit erred in its judgment affirming the judgment of the District Court, without referring to or considering the assignments of error relating to the rulings of the trial Court in the progress of the trial. This Court, on certiorari, remanded the case to the Court of Appeals, with instructions to consider the several assignments of error on the record. See, also to the same effect, *Liberty Oil Co.* v. *Condon Bank,* 260 U. S. 235, 245; *Twist* v. *Prairie Oil Co.,* 274 U. S. 684, 692. But, in these cases, the Courts of Appeal entered *judgments.* While in the case at bar, the Court of Appeals rendered no "judgment or decree." In Freeman on Judgments (5th Ed.), section 17, the author defined the word "judgment" to be the 'final determination of the rights of the parties in an action or proceeding.' "

The same author then defines "orders" thus: "While an order may under some circumstances amount to a judgment, they must be distinguished. * * * Rulings on motions are ordinary orders rather than judgments. Freeman on Judgments (5th Ed.), section 19, p. 28. An order of court is based on a motion; a judgment is based upon the trial or hearing on the merits. Freeman, supra, section 19. An order of dismissal fulfills none of the requirements of a judgment. In in re Weber, 4 North Dak., 119, 59 N. W. 523. "A judgment is the sentence of the law upon the record. It is the application of the law to the facts and pleadings." *State ex rel. McManus* v. *Muench,* 217 Mo. 124, 117 S. W. 25, 29. Thus, the Court of Appeals below, by its dismissal of the appeal, has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure from the District Court below acting by its clerk, and its Judge out of court, as to call for the exercise of this Court's power of supervision.

(c) Title 28 U. S. C. 1254 (1) authorizes this Court to grant the writ of certiorari to a circuit court of appeals either "before or after rendition of judgment or decree." Petitioner now urges this Court to grant the writ in this case, since no judgment has been rendered by the Court of Appeals below. The record discloses the unwillingness of that Court, and the District Court below, to perform their judicial duty in this particular case. The lands involved have been in *custodia legis* ever since April 8, 1931 (R. 11-12), and their status cannot be changed except by order of the Hustings or Corporation Court for the City of Petersburg, Virginia. *Palmer* v. *Texas,* 212 U. S. 118.

(d) The decision of the Court of Appeals below is in conflict with the decision of the United States Court of Appeals for the Eighth Circuit, *United States* v. *Turner,* 47 F. 2d 86, on the same matter. That Court in its decision reversed

the order of the trial Court denying a motion to vacate a void decree, and remanded the case with directions to vacate its void decree of October 23, 1929.

(e) This Court has never construed Rule 77 (b), first sentence, of the Federal Rules of Civil Procedure.

(f) This Court has never construed the provisions of Title 28 United States Code, Section 296, third paragraph, when connected with the foregoing Rule.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for the writ of certiorari be granted.

September 22, 1951.

CHARLES WILLIAM FREEMAN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No.

EARL T. ELLIS, RECEIVER OF THE QUANTICO COMPANY, INCORPORTATED,

Petitioner,

vs.

CLIFTON B. CATES

BRIEF IN SUPPORT OF PETITION

I

Opinions Below

No opinion was filed by either Court below.

II

Jurisdiction

The jurisdictional statement appears in the preceeding petition for the writ of certiorari at page 2.

III

The Facts

The facts are stated in the preceding petition under the "Summary Statements of the Matter Involved," pages 2-4.

IV

Specification of Errors

The Court of Appeals for the Fourth Circuit erred:

1. In its order of April 13, 1951, granting the motion of respondent to dismiss the appeal and dismissing it.

2. In its order of June 25, 1951, denying the petitioner's motion to vacate its order dismissing the appeal.

3. In failing to review and pass upon the questions and points of law presented by the record from the trial Court.

4. In failing to consider and pass upon petitioner's motion to vacate the purported judgment of July 20, 1949.

5. In failing to consider and pass upon the purported order of January 24, 1951, from which an appeal was taken.

6. In failing to construe the provisions of Rule 77 (b), first sentence, of the Federal Rules of Civil Procedure.

Preliminary Statement

The Solicitor General refused to stipulate with counsel for petitioner to omit the printing of immaterial parts of the original record made in the trial court, as supplied by the clerk thereof without authority. These immaterial parts are: Defendants motion for summary judgment (R. 7). Affidavit of Edmond C. Fletcher and exhibits (R. 11-12). Memorandum opinion (R. 14). Description of land in complaint (R. 2-4). They constitute 13 printed pages of useless matter.

V

ARGUMENT

Point 1

The Court of Appeals erred in its order of April 13, 1951, granting the motion of respondent to dismiss the appeal and dismissing it.

The appeal papers were docketed in the Court of Appeals below on March 30, 1951 (R. 29). The docket entries show that on April 3, 1951, George R. Humrickhouse, U. S. Attorney, entered his appearance as counsel for the appellee (R. 29). On April 4, 1951, Alfred W. Trueax entered his appearance as counsel for the appellant (R. 30). No other attorneys entered the case. These papers show that Mr. Humrickhouse, on April 2, 1951, before his entry of appearance, drafted and signed a motion to dismiss the appeal and, at the end thereof, appended a "Notice" reading as follows (R. 30):

> "To Nicholas A. Colasanto, attorney for Earl T. Ellis, Receiver, etc., appellant:
>
> "Please take notice that on April 13, 1951, at 9:30 o'clock a. m., I shall bring the above captioned motion on for hearing before the United States Court of Appeals for the Fourth Circuit in its courtroom in the Post Office Building, City of Richmond, Virginia.
>
> "Dated this *2nd day* of April, 1951.
>
> GEORGE R. HUMRICKHOUSE,
> *United States Attorney,*
> *Attorney for Appellee.*
>
> "I hereby certify that a copy of the foregoing motion was this day mailed to Nicholas A. Colasanto, Esquire, attorney for Earl T. Ellis, Receiver, etc.,

appellant, at his address, 107 South Royal Street, Alexandria, Virginia, postage prepaid.

"Dated this *2nd day* of April, 1951.

GEORGE R. HUMRICKHOUSE,
United States Attorney."

The above shows that George R. Humrickhouse was not an attorney of record for the appellee on April 2, 1951, and that Nicholas A. Colasanto was not an attorney of record for appellant on April 2, 1951, or any other time. Consequently, this notice was not a notice to the appellant. Yet he personally appeared before the Court of Appeals on April 13, 1951, and argued and submitted his unauthorized motion to dismiss the appeal, as though it had been actually served upon counsel of record, *and withheld from the Court* the fact that Mr. Trueax was the only counsel of record for appellant. This sort of proceeding, in the absence of appellant's counsel, constituted a gross fraud upon that Court and the appellant. And that Court, on that day, entered an order dismissing the appeal (R. 31), in a case involving land having a fair value of $14,000,000.00. That Court of Appeals has no Rules authorizing the dismissal of appeals after they have been docketed in the Court within the time prescribed by law. Its only Rule relating to motions is Rule 16, paragraph 2, which in part provides: "Notice of motion shall be given to the adverse party * * *; and no motion to dismiss will be entertained in the absence of such notice * * *." Even this Rule was disregarded by that Court, and its order of dismissal is *void* for excess of jurisdiction.

Furthermore, this pretended motion sought to inform that Court that an order denying a motion to vacate a judgment is not appealable, *but failed to inform the Court that a motion to vacate a* VOID *judgment is appealable. United States* v. *Turner,* 8 Cir., 47 F. 2d. 86; *Klapratt* v. *United States,* 335 U. S. 601, 609. That pretended

motion also sought to inform the Court of Appeals that it had adjudicated the case in *Ellis* v. *Cates,* 178 F. 2d. 791, when the record shows that petitioner's motion to vacate a void judgment of the District Court below, bearing date of July 20, 1949, was never before that Court of Appeals.

POINT 2

The Court of Appeals erred in its order of June 25, 1951, denying the petitioner's motion to vacate its order dismissing the appeal.

On April 27, 1951, petitioner filed a motion to vacate that Court's order dismissing said appeal, upon eight grounds, the first of which recited: "Because the motion of appellee is not authorized by law nor the Rules of this Court, and its granting by the Court exceeded its jurisdiction" (R.31). To the motion was an appended notice that counsel waived oral argument in open court, with direction to the Clerk of the Court to submit the motion to the Court at Asheville, North Carolina, at its June Term, 1951. On June 11, 1951, that Court directed its Clerk to send a letter to counsel for the appellee and appellant—a matter outside the functions of that Court, and it was so done. The letter (not in the record here) reads thus:

"Clerk's Office
United States Court of Appeals
For the Fourth Circuit

Post Office Box #3
Asheville, North Carolina

June 11, 1951

George R. Humrickhouse, Esq.,
U. S. Attorney,
Richmond, Virginia

No. 6259, Earl T. Ellis, Receiver of the Quantico Company, Incorporated, v. Clifton B. Cates (Quantico, Va.).

Dear Mr. Humrickhouse:

On call of the motion of the appellant to vacate the order of dismissal of the above entitled case and to reinstate the appeal on the docket, the Court continued the motion for two weeks and directed me to notify you to file an answer thereto within such time *setting forth the facts.* A copy of such answer should be furnished counsel for the appellant.

Please acknowledge receipt of this notification.

Very truly yours,

Claude M. Dean, Clerk.

D to D
Copy to:
Alfred W. Trueax, Esq.,
Attorney at law,
Court House Square,
Arlington, Va." (Italics supplied for emphasis.)

The "facts" were already on file in the docket entries of the Clerk of that Court (R. 29-30), together with the pretended motion filed in that Court on April 3, 1951, and they could not be enlarged by any subsequent answer of the appellee. On June 20, 1951, George R. Humrickhouse, United States Attorney, counsel for the appellee, filed in the Court of Appeals a so-called answer to the appellant's motion to vacate said order of April 13, 1951, and it shows on its face that no copy was served upon Alfred W. Trueax, counsel for the appellant (R. 36). This answer is a judicial monstrosity, hence it requires no discussion. On June 25, 1951, the Court of Appeals entered an order denying the motion of appellant to vacate its order of April 13, 1951, dismissing the appeal, and to reinstate said appeal (R. 31).

Petitioner contends that such order of June 25, 1951, is void on its face for excess of jurisdiction committed by that Court of Appeals in this case.

POINT 3

The Court of Appeals erred in failing to review and pass upon the questions and points of law presented by the record from the trial Court.

The circuit courts of appeal of the United States were set up by Congress, in 1891, to review, reverse, affirm, or modify final decisions of the district courts of the United States. Title 28 U. S. C., section 1291, creates such jurisdiction. This action involves land exceeding $3,000.00 in value, exclusive of interest and costs, and is between citizens of different States (R. 1). The District Court below had original jurisdiction of the case under Title 28 U. S. C., section 1332 (a) (1), and special jurisdiction, under Rule 56 of the Federal Rules of Civil Procedure, to adjudicate the petitioner's motion for summary judgment, and his motion to strike the motion of respondent for summary judgment. Hence, both Courts below had jurisdiction under the laws. But the Court of Appeals below has abdicated its jurisdiction to either affirm, modify, or reverse the final order entered by the District Court below on January 24, 1951. In *Mutual Life Insurance Co.* v. *Phinney,* 178 U. S. 327, 337, this Court said: "We are clear that upon the showing made the Court of Appeals had jurisdiction, and should have disposed of the case on the merits." "The courts of the United States are to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Chicot County* v. *Sherwood,* 148 U. S. 529, 534. In *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, 268, this Court said:

> "It is patent from the statement we have made that the only ground upon which the power of certiorari

could have been exerted was the failure of the court below to consider the case before it, we think this record presents an exception to the general rule of procedure above referred to. In other words, in a case like this we think the judgment of the Court of Appeals must be reversed and remanded to that Court *to the end that the duty to hear and decide it may be performed.*" (Italics supplied.)

See, also to the same effect, *Wm. Cramp Sons* v. *Curtiss Turbine Co.*, 228 U. S. 645, 651; *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792, 797-798; and *Brown* v. *Fletcher*, 237 U. S. 583, 586-588. But, in these cases, judgments were rendered by the Court of Appeals. Here, in the case at bar, the Court of Appeals rendered *no judgment* on the merits. Hence, this Court is urged to proceed as it did in *Liberty Oil Co.* v. *Condon Bank*, 260 U. S. 235, 245, and as authorized by Title 28 U. S. C., section 1254 (1), and decide the questions presented by this petition for the writ of certiorari.

POINT 4

The Court of Appeals erred in failing to consider and pass upon the petitioner's motion to vacate the purported judgment of July 20, 1949.

The Court of Appeals below, by its unauthorized proceedings aforesaid, thereby avoided the duty of considering and passing upon the provisions of the purported judgment of July 20, 1949. This document, as already stated, was dated and signed by the trial Judge at Tarboro, North Carolina, and by him transmitted by letter to the Clerk of the Court at Alexandria, Virginia, and by him entered upon the records as a final judgment against the plaintiff (petitioner here) in the case. The Judge's letter of transmittal is in the present record (R. 43). The adjudging part of that

purported judgment, by proxy of the Judge, reads as follows (R.29):

> "It is ordered and decreed that the plaintiff is not entitled to recover possession of the lands described in the complaint; that the action be dismissed, and that the defendant recover costs to be taxed by the Clerk.
>
> It is ordered and decreed that the plaintiff's motion for summary judgment be and the same is hereby denied. This 20th day of July, 1949.
>
> DON GILLIAM, United States District Judge (E. D. N. C.), sitting by special assignment."

The docket entries of the trial Court on June 6, 1949 (R.28), show only two motions were heard by that Court on that date, to wit, the motion of plaintiff for summary judgment in his favor, and his motion to strike the motion of the defendant for summary judgment. The motion for summary judgment, under Rule 56 of the Federal Rules of Civil Procedure, included a consideration of the pleadings, admissions on file, and affidavits in support of the motion. Hence, the matter involved evidence affecting the rights of the parties on the merits. But, since the action was dismissed on the records of the District Court below, in the absence of any motion therefor, it follows that the pretended judgment is void on its face for want of motion, and void because not rendered or pronounced by the Judge in open court on July 20, 1949. Such a pronouncement in open court is required by the well-established principles of judicial procedure and, especially, by Rule 77 (b), first sentence, of the Federal Rules of Civil Procedure which provides: "All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom." "The term "trial" is broad enough to include any judgment, final order, or decree, not interlocutory in its nature." 64 C. J., section 3, p. 34.

In *Kelly* v. *United States,* 2 Cir., 89 F. 2d 866, 869, the Court said: "A District Judge ordered by the Senior Circuit Judge to hold court in a district other than his own, is not thereby empowered to sign and enter orders in such other district when absent therefrom." In the case at bar, the District Court did not sit on July 20, 1949.

> "It is not uncommon for a duly organized court to proceed without the requisite jurisdiction or to act in excess of its given powers; *less often, very rarely in fact, do instances occur of an utter want of legal organization in the tribunal assuming to act as a court.* The purported judgments of such a tribunal would be entirely void and entitled to no consideration. * * * The tribunal assuming to act as a court may in reality be no court at all and its proceedings, orders and judgments be entirely nugatory. * * *" (Italics supplied)
>
> Freeman on Judgments (5th Ed.), sec. 326.

In *United States* v. *Ginsberg,* 243 U. S. 475, the Court said: "The term 'open court' is used in contradistinction to a judge sitting at chambers. * * * The plain language repels the idea that any part of a final hearing may take place in chambers, whether adjoining the court room or elsewhere." And the Court further said: "The judgment is the act of the court. * * * The clerk records the judgment of the court, but does not thereby render judgments." In re ex parte Morgan, 114 U. S. 174.

> "Since the rendition of a judgment is strictly a judicial act, it can be performed only at a time and place at which judicial action is proper. An attempt to render a judgment at any other time would be an act done without jurisdiction and therefore void. * * * Generally, *judgments must be rendered in open court.*"
>
> Freeman on Judgments, sec. 51, and cases.

Sublett v. *Gardner,* 144 Ky. 190, 137 S. W. 864.
United States v. *Stoller,* 180 Fed. 910, 913.
State v. *Hall,* 142 N. Car. 710.
State v. *Nathan,* 49 S. Car. 199, 228.

The Court of Appeals erred in failing to consider and pass upon the provisions of the purported judgment of July 20, 1949.

POINT 5

The Court of Appeals erred in failing to consider and pass upon the purported order of January 24, 1951, from which an appeal was taken.

What has been said under the preceding paragraph 4, as to the void judgment of July 20, 1949, is adopted here as wholly applicable. This purported order of January 24, 1951, however, requires special treatment. It shows a conclusion reading as follows: "Entered at Tarboro, North Carolina, this 24th day of January, 1951. Don Gilliam, United States District Judge." Evidently, Judge Gilliam thought the District Court in Virginia was in Tarboro, North Carolina. But, irrespective of what he thought, that very document was transmitted by him by letter to the Clerk of the Court at Alexandria, Virginia, where it was *entered* on his records as of January 24, 1951 (R.24). Again appears, in the beginning part of that document, the following words: "The undersigned, sitting by designation at Alexandria in the Eastern District of Virginia, *on the 6th day of June, 1949, heard and allowed a motion by the defendant for summary judgment*"; These words in italics were supplied by Judge Gilliam; they are contrary to his purported judgment of July 20, 1949; they are contrary to

the record docket entries as made by the Clerk in the case on June 6, 1949, which read as follows (R.28):

> "June 6, 1949. Trial Proceedings: George R. Humrickhouse, U. S. Attorney; John Locke Green, attorney for plaintiff. This cause came on to be heard on motion for summary judgment in behalf of plaintiff. Motion by plaintiff to strike defendant's motion for summary judgment. Court directs counsel to submit memorandum as to issue within three weeks."

Moreover, Judge Gilliam thereby sought to obscure his activities at Tarboro, North Carolina, on July 16, and 20, 1949. He had in his hands at Tarboro on January 24, 1951, a copy of the plaintiff's motion to vacate the purported judgment of July 20, 1949, as being void on its face (R.2/). That motion, paragraph 11, informed him of his judicial delinquency in signing an opinion at Tarboro on July 16, 1949, after its receipt from an attorney in the Department of Justice. A detailed exposure of this fraud has been observed by this Court in the amended petition for rehearing in case No. 739, October Term, 1949, of this Court. It also appears that Judge Gilliam acted on his own motion, and without notice to counsel for the parties, and drafted and signed the purported order of January 24, 1951, although the petitioner called for a hearing on his motion to be held in open court at Alexandria, Virginia, on January 30, 1951. Such procedure was not authorized by Title 28, U. S. C., section 296, third paragraph, or any other law.

The motion to vacate the void judgment was authorized by Rule 60 (b) (4) (6) of the Federal Rules, supra, as amended in March, 1948. This Rule is a recognition of the right of a litigant to move, at any time, to vacate a void judgment from the records where entered. The subject was fully discussed by this Court in the recent case of *Klapprott* v. *United States,* 335 U. S. 601, 609, where the Court

of Appeals was reversed and the case remanded to the District Court, with directions to vacate to its order dismissing the petition of petitioner to set aside an order admitting him to citizenship. In Freeman on Judgments (5th Ed.), section 226, the author said:

> "It is a universally recognized rule that a judgment which is absolutely void may be vacated by the court in which it was entered."

See, also, *U. S.* v. *Essex Automobile,* 276 Fed. 28; *Rehfeld* v. *Baltimore, etc.,* 187 Fed. 810; and *United States* v. *Turner,* 8 Cir., 47 F. 2d 86. "The fact that the void judgment has been affirmed or reviewed in an appellate court adds nothing to its validity. Such a judgment has been characterized as a 'dead limb on the judicial tree' which may be lopped off at any time." Freeman on Judgments, *supra.* In *United States* v. *Turner, supra,* the Court in the eighth circuit declared these principles:

> "Because the original decree in this case was void, the suit in which it was mistakenly entered was still pending, and the applicant had the right to ask that the entry of such a decree should be stricken from the records of the court as an impediment to a proper disposition of the suit. See Harris v. Hardeman, supra. While such impediment existed the refusal of the court to vacate the void decree was a final order which determined the rights of the parties to the suit. The parties appeared before the court and submitted to the court the motion to vacate the decree. *As the lack of jurisdiction to make the decree rendered was apparent on the face of the record, we think the court erred in refusing to vacate the decree."* (Italics ours)

The Court of Appeals erred in failing to consider and pass upon the purported order of January 24, 1951, from which an appeal was taken. That Court has deprived petitioner of his property without due process of law.

Point 6

The Court of Appeals erred in failing to construe the provisions of Rule 77 (b), first sentence, of the Federal Rules of Civil Procedure.

The argument and citations under points 4 and 5 are adopted here under this point 6. Rule 77, *supra,* has never been construed by any Court since its promulgation.

Conclusion

It is respectfully submitted that this case calls for the exercise by this Court of its supervisory powers, in order that it may finally adjudicate the rights of the petitioner and respondent herein, and to that end a writ of certiorari should be granted so that this Court may review the action and decision of the Court of Appeals below, as well as the action of the Judge of the District Court below, and that the decision of the Court of Appeals be reversed, and the cause remanded to the District Court below with directions to vacate its purported order of January 24, 1951, and its purported order of July 20, 1949, and pronounce a judgment in open court at Alexandria, Virginia, on the plaintiff's motion for summary judgment, and the plaintiff's motion to strike the motion of the defendant for summary judgment, as submitted to that Court on June 6, 1949.

Respectfully submitted,

Charles William Freeman,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Argument	5
Conclusion	9

CITATIONS

Cases:

Kelly v. *United States*, 89 F. 2d 866, affirmed *sub nom. Frad* v. *Kelly*, 302 U. S. 312	6
United States v. *H. B. Gilliam and C. E. Ellis, Receivers of The Quantico Company*, Equity No. 33 E. D. Va., *sub nom. United States* v. *McIntosh*, 2 F. Supp. 244	8
United States v. *Turner*, 47 F. 2d 86	7

Statute:

28 U.S.C. 296	5, 6

Miscellaneous:

F.R.C.P. Rule 77(b)	5

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 347

EARL T. ELLIS, RECEIVER OF THE QUANTICO COMPANY, INCORPORATED, PETITIONER

v.

CLIFTON B. CATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

Petitioner here seeks review of an order dismissing an appeal from an order of the district court of January 24, 1951 (R. 24-25), denying a motion to vacate a final judgment entered on July 20, 1949 (R. 20-21). Neither the district court nor the court of appeals wrote an opinion in denying the motion to vacate. However, the opinion of the trial court (R. 14), dated July 16, 1949, following a hearing on the merits, is reported

at 88 F. Supp. 19. The opinion of the court of appeals affirming the judgment on the merits is reported at 178 F. 2d 791.

JURISDICTION

The order of the court of appeals dismissing the appeal was entered on April 13, 1951 (R. 31). A motion to vacate the order of dismissal was denied on June 25, 1951 (R. 31-32, 36). The petition for writ of certiorari was filed September 22, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether a federal judge, having heard a case by assignment in a district other than his own, has power to decide the case and enter judgment upon his return to his own district.

STATEMENT

This action was instituted by the filing of a complaint (R. 1-5) on December 18, 1947, to recover possession of certain lands forming part of the United States Marine Corps Base at Quantico, Virginia.[1] Respondent answered (R. 3-5 in No. 739, October Term, 1949). Thereafter petitioner filed a request for admission of certain

---

[1] In appealing from the order of the trial court overruling his motion to vacate, and in now asking review by this Court, petitioner took up only a partial record. A more complete record was before this Court on a previous petition for writ of certiorari in this same case, No. 739, October Term, 1949, and references to that record will be made where necessary in stating the case.

facts, which were in effect admitted by respondent. On October 12, 1948, petitioner filed a motion for summary judgment (R. 7 in No. 739, October Term, 1949). Respondent likewise filed a motion for summary judgment on May 18, 1949 (R. 7). Hearing was had on both motions on June 6, 1949 (R. 28).[2] On July 20, 1949, the trial court entered its judgment granting respondent's motion for summary judgment and dismissing the action (R. 20). In doing so the court wrote an opinion dealing exhaustively with the merits (R. 14-19). Petitioner thereupon appealed to the court of appeals, which court, on December 20, 1949, likewise fully explored the merits in a well-considered opinion and affirmed the judgment of the trial court (178 F. 2d 791). Petitioner then filed a petition for a writ of certiorari in this Court, which was denied on May 29, 1950 (339 U.S. 964). A petition for rehearing was likewise denied on October 16, 1950 (340 U.S. 857).

On December 27, 1950, petitioner filed in the district court a motion to vacate the judgment of

---

[2] Petitioner's statement (Pet. 19) that respondent's motion was not before the court on this hearing is erroneous and is based on the mere failure of the clerk to mention that motion in his docket entry. The judgment of July 20, 1949 (R. 20) expressly recites that the cause was heard "on motion of the respective parties for summary judgment." The same claim was made by petitioner when this case was before this Court on the first petition for certiorari. (See Pet. 2, 9, 18, petitioner's reply brief, p. 3, and brief in opposition, p. 6, in No. 739, October Term, 1949.) Likewise the reference to "want of motion" [by respondent] (Pet. 19) is wholly unjustified. That motion appears at R. 7.

July 20, 1949 (R. 21-23). Although the motion listed twelve purported grounds of attack on the judgment, the only ground not previously litigated, and the one upon which petitioner primarily relies in the present petition, is that the judgment of July 20, 1949, is void because not rendered in open court. The basis of this charge is that Judge Gilliam who presided at the hearing of this case on June 6, 1949, by assignment, returned to his home district after the hearing and signed the judgment at Tarboro, North Carolina.[3]

On January 24, 1951, the trial court entered its order denying the motion to vacate, stating that the motion set out no ground for relief and that it was not filed in time (R. 24-25). On February 20, 1951, a notice of appeal from that order was filed (R. 26). Respondent on April 3, 1951, filed a motion to dismiss the appeal on the ground that an order denying a motion to vacate a judgment is not appealable and that the appeal was frivolous (R. 29-30). On April 13, 1951, hearing was had, there being no appearance for petitioner, and on that date the court of appeals entered its order dismissing the appeal (R. 31). On April 27, 1951,

---

[3] The motion also alleged (R. 23, paragraphs 11 and 12) that the trial court's opinion was written and prepared by an attorney in the Department of Justice, and that this constituted fraud which vitiates the judgment. This claim, wholly unsupported by the record, is referred to but hardly relied on at Pet. 22. It requires scant notice. Even if it were true the court's action was not improper. Moreover, the same claim was before this Court in petitioner's Amendment to Petition for Rehearing in No. 739, October Term, 1949.

petitioner filed a motion to vacate the order of dismissal, his principal ground being that notice of the motion was not given to petitioner's then counsel of record. Petitioner in said motion waived oral argument. (R. 31-32.) The court of appeals thereupon required respondent to file an answer, which answer, setting forth the facts as to notice of the motion to dismiss, was filed on June 20, 1951 (R. 34-36). Thereafter, on June 25, 1951, the court of appeals entered its order denying the motion to vacate the order of dismissal entered on April 13, 1951 (R. 36).

ARGUMENT

1. Petitioner's contention (Pet. 5, 6, 18-21) that the judgment of July 20, 1949, is void is so patently frivolous and spurious that the dismissal of the appeal was fully warranted. Petitioner cites Rule 77(b) of the Federal Rules of Civil Procedure (Pet. 6), but that rule has no application to entry of judgments. It merely requires that all trials upon the merits be conducted in open court. The hearing of this case was had on June 6, 1949 (R. 28). Petitioner admits that that hearing was had in open court (R. 21).

On the subject of the power of an assigned judge who has tried a case in the assigned district and returned to his own district, to decide the case in his own district and enter judgment, the law is too clear to permit argument. Title 28 U.S.C. sec. 296 provides, *inter alia,* as follows:

A justice or judge who has sat by designa-

> tion and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

Petitioner's reliance on the decision in *Kelly* v. *United States,* 89 F. 2d 866, 869 (C. A. 2, 1937) (Pet. 20) is unavailing. That case came before this Court, *sub nom. Frad* v. *Kelly,* 302 U.S. 312. The Court clearly distinguished the case there presented from that here presented. After citing 28 U.S.C. sec. 22 (now 28 U.S.C. sec. 296 above quoted) it stated: "And where a cause has been submitted to him in the designated district, after his return to his own district he may enter decrees or orders and file opinions necessary to dispose of the case, notwithstanding the termination of his period of service in the foreign district" (302 U.S. 316-317). This also disposes of petitioner's challenge to the judgment of January 24, 1951 (Pet. 21-24) based upon the same frivolous contention.

Thus this is not a case of the court of appeals refusing to order a void judgment vacated, but one where the case had already been twice litigated (see *infra,* p. 8) and the ground urged as voiding the judgment was so patently unsound and frivolous that the court was justified in dismissing

the appeal. Hence the asserted conflict with *United States* v. *Turner,* 47 F. 2d 86 (C.A. 8) (Pet. 8) is non-existent.

2. While it is believed that the aforementioned question is the only one requiring reply, petitioner's claim to having been denied his day in court by the court of appeals is without foundation. This is built upon the claim that proper notice was not given petitioner of respondent's motion to dismiss (Pet. 13-15). Petitioner's motion to vacate the judgment was filed in the district court by Nicholas A. Colasanto, 107 S. Royal Street, Alexandria, Virginia, and Edmund C. Fletcher, 103 C Street, S. E., Washington, D. C., as attorneys for petitioner (R. 23). Petitioner's notice of appeal was likewise signed by those parties (R. 26). On April 2, 1951, a copy of respondent's motion to dismiss was sent to Mr. Colasanto at the Alexandria address, which motion was filed in the appellate court the following day (R. 29-30). On April 4, 1951, Alfred W. Trueax entered his appearance in the appellate court for petitioner (R. 30).

Petitioner argues that in these circumstances Colasanto was not an attorney of record for petitioner. But the addition of one attorney does not work a withdrawal of another. There is no showing of record that Colasanto has ever formally withdrawn. Nor does petitioner say that he did not actually receive notice through Colasanto.

Moreover, the question is rendered academic by

the fact that, upon petitioner's motion to vacate the order of dismissal of the appeal, based on this same claimed lack of service of the motion to dismiss (R. 31-32, par. 4), which the court entertained and considered, petitioner expressly waived oral argument. He could have had his opportunity to argue the matters he now argues here. Deliberately rejecting such opportunity, he is in no position to complain.

3. This case is here for the second time. The opinions of the trial court in deciding this case (R. 14-19) and of the court of appeals on the first appeal (178 F. 2d 791) demonstrate that petitioner's case is wholly without merit. This Court denied certiorari. The matter had already been fully and finally litigated as far back as 1932. *United States* v. *H. B. Gilliam and C. E. Ellis, Receivers of The Quantico Company,* Equity No. 33 in the district court, reported *sub nom. United States* v. *McIntosh,* 2 F. Supp. 244. In that case, as in the instant case, it was finally and conclusively established that the United States validly acquired the land involved and that The Quantico Company, through petitioner's predecessors, received just compensation in an amount agreed upon by them. Having no case whatever on the merits, the current maneuvering constitutes an inexcusable trespass on the time of the courts below and this Court.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
WILLIAM AMORY UNDERHILL,
Assistant Attorney General.
ROGER P. MARQUIS,
FRED W. SMITH,
Attorneys.

OCTOBER 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 971357 307